
OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2011-4

March 24, 2011

OFFICIAL OPINION 2011-4

The Honorable Greg Taylor
Indiana State Senate
200 W. Washington St.
Indianapolis, IN 46204

RE: Governor's Commission on Minority and Women's Business Enterprises and State Educational Institutions

Dear Senator Taylor:

You have asked if state educational institutions fall under the jurisdiction of the Governor's Commission on Minority and Women's Business Enterprises (the "Commission"), established at Ind. Code Chpt. 4-13-16.5, in regard to annual goals for the use of minority and women's business enterprises. You state that you have discovered that "Indiana's state funded universities do not believe that they are required to comply with M/WBE percentages in all contracting for construction, professional services, or other services."

BRIEF ANSWER

State educational institutions are explicitly subject to the contracting goals established by the Commission under Ind. Code § 4-13-16.5-2 (f), and are required to report on minority and women's business enterprise participation in contracts.

However, the Commission's direct oversight and supervision of the contracting process does not extend to state educational institutions.

ANALYSIS

The Commission has broad authority to promote the use of minority and women's business enterprises by all state tax-supported entities, to establish goals in line with *Richmond v. Croson*, 488 U.S. 469 (1989), and to receive and evaluate data regarding the use of such enterprises in contracts. Ind. Code § 4-13-16.5-2(b)(10).

In particular, Ind. Code § 4-13-16.5-2(f) provides that the Commission shall:

- (7) Define the duties, goals, and objectives of the deputy commissioner of the department as created under this chapter to assure compliance by all state agencies, separate bodies corporate and politic, and state educational institutions with state and federal legislation and policy concerning the awarding of contracts (including, notwithstanding section 1(d) of this chapter or any other law, contracts of state educational institutions) to minority and women's business enterprises.
- (8) Establish annual goals:
 - (A) for the use of minority and women's business enterprises; and
 - (B) derived from a statistical analysis of utilization study of state contracts (including, notwithstanding section 1(d) of this chapter or any other law, contracts of state educational institutions) that are required to be updated every five (5) years.
- (10) Ensure that the statistical analysis required under this section:
 - (A) is based on goals for participation of minority business enterprises established in *Richmond v. Croson*, 488 U.S. 469 (1989);
 - (B) includes information on both contracts and subcontracts (including, notwithstanding section 1(d) of this chapter or any other law, contracts and subcontracts of state educational institutions); and
 - (C) uses data on the combined capacity of minority and women's businesses enterprises in Indiana and not just regional data.

In addition, the Deputy Commissioner for minority and women's business enterprise development shall:

(5) Require all state agencies, separate bodies corporate and politic, and state educational institutions to report on planned and actual participation of minority and women's business enterprises in contracts awarded by state agencies.

(6) Determine and define opportunities for minority and women's business participation in contracts awarded by all state agencies, separate bodies corporate and politic, and state educational institutions.

Ind. Code § 4-13-16.5-3(b).

However, the Commission's authority for oversight over the contracting process extends only to executive branch agencies. The definitions section of the Commission's authorizing statute, Ind. Code § 4-13-16.5-1, provides in pertinent part (emphasis added):

(d) "Contract" means any contract awarded by a state agency or, as set forth in section 2(f)(11) of this chapter, awarded by a recipient of state grant funds, for construction projects or the procurement of goods or services, including professional services. . . .

(e) "Contractor" means a person or entity that . . . (1) contracts with a state agency . . .

(f) "Department" refers to the Indiana department of administration established by [IC 4-13-1-2](#).

(l) "State agency" refers to any authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative, department of state government.

Thus, the Commission shall

(f)(6) Evaluate the competitive differences between qualified minority or women's nonprofit corporations and other than qualified minority or women's nonprofit corporations that offer similar services and make recommendation to the department [of administration] on policy changes necessary to ensure fair competition among minority and women's business enterprises.

(j) The commission shall advise the department [of administration] on developing a statement, to be included in all applications for and agreements governing grants made with state funds, stating the importance of the use of minority and women's business enterprises in fulfilling the purposes of the grant.

Further, Ind. Code § 4-13-16.5-2 imposes obligations on the department of administration, which has no authority over state educational institutions¹:

(g) The department shall direct contractors to demonstrate a good faith effort to meet the annual participation goals established under subsection (f)(11). The good faith effort shall be demonstrated by contractors using the repository of certified firms created under section 3 of this chapter or a similar repository maintained by a unit (as defined in [IC 4-4-32.2-9](#)).

(i) The department shall furnish administrative support and staff as is necessary for the effective operation of the commission.

The department of administration is also as some responsibility for determining the goals and ensuring they are met, and for adopting rules to implement Ind. Code Chpt. 4-13-16.5:

Ind. Code § 4-13-16.5-4. Determinations regarding goals; adoption of rules

(a) Before January 1 of even-numbered years, the department shall determine whether, during the most recently completed two (2) year period ending the previous July 1, the goals set under section 2(f)(8) of this chapter have been met.

(b) The department shall adopt rules under [IC 4-22-2](#) to ensure that the goals set under section 2(f)(8) of this chapter are met. . . .

Ind. Code § 4-13-16.5-5. Rules

The Indiana department of administration may adopt rules under [IC 4-22-2](#) to implement this chapter.

We further note that the contractor notice to minority businesses and women's business enterprises required by Ind. Code § 4-13-16.5-8 applies only to state executive branch agencies:

(a) This section applies to a contractor whose offer designated minority businesses or women's business

enterprises to furnish any supplies or perform any work under the contract awarded to the contractor.

(b) As used in this section, "contract" refers to any of the following:

(1) A contract for the purchase of supplies by a state agency.

(2) A contract for the performance of services for a state agency.

(3) A public works contract (as defined in [IC 4-13.6-1-14](#)).

(4) A contract to perform professional services (as defined in [IC 4-13.6-1-11](#)) in connection with a public works contract.

(c) As used in this section, "contractor" refers to a person awarded a contract by a state agency.

We note that the administrative rules adopted by the department of administration do define "state agency" to include a state educational institution at [25 IAC 5-2-1](#):

(19) "State agency" means any of the following:

(A) An authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative department of state government.

(B) An entity established by the general assembly as a body corporate and politic.

(C) A state educational institution.

The inclusion of a state educational institution within the definition of a state agency is appropriate in the context of [25 IAC 5-7-2](#), which relates to the goal-setting functions of the Commission and the department, and in other sections which relate to reporting requirements.

However, an administrative rule can only "implement, interpret, or prescribe (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency." Ind. Code § 4-22-2-3 (b). As the Indiana Supreme Court has frequently held:

An agency may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law. Any regulation that conflicts with statutory law is wholly invalid.

Leone v. Comm'r, Indiana Bureau of Motor Vehicles, 933 N.E.2d 1244, 1250 (Ind. 2010). See also *Varner v. Indiana Parole Bd.*, 922 N.E.2d 610 (Ind. 2010); *Indiana Dept. of State Revenue v. Bulkmat Transp. Co.*, 648 N.E.2d 1156 (Ind. 1995).

Thus, to the extent that the rules adopted by the department of administration at 25 IAC impose obligations on state educational institutions relating to the procurement process and direct oversight of the contracts between state educational institutions and their contractors, the rules would be adding to the law, and would be extending the powers of the department beyond those conferred upon it by law. This is consistent with the fact that Ind. Code Art. 5-22, which governs state purchasing process and procedures, does not apply to a state educational institution. Ind. Code § 5-22-2-1.

CONCLUSION

State educational institutions are explicitly subject to the contracting goals established by the Commission under Ind. Code § 4-13-16.5-2 (f), and are required to report on minority and women's business enterprise participation in contracts.

However, the Commission's direct oversight and supervision of the contracting process does not extend to state educational institutions.

Sincerely,

Gregory F. Zoeller
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¹ The Department of Administration is established at Ind. Code § 4-13-1-2. Among its duties is to "supervise and regulate the making of contracts by state agencies." Ind. Code § 4-13-1-4 (2). For the purposes of Ind. Code

chapter 4-13-1, "state agency" means "an authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative, department of state government. The term 'state agency' does not include the judicial or legislative departments of state government, nor does that term include a state educational institution."

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